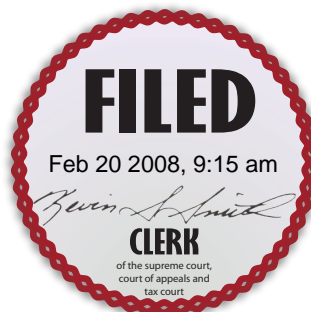


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**IN THE
COURT OF APPEALS OF INDIANA**

ROBERT LEE SHORTER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 20A03-0707-CR-320

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0606-MR-5

February 20, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Robert Lee Shorter appeals his conviction of Murder¹ and the sentence imposed thereon. Shorter presents the following restated issues for review:

1. Did the trial court err in admitting autopsy photos and shotgun shells into evidence?
2. Was the evidence sufficient to support the conviction?
3. Did the trial court err in sentencing Shorter?

We affirm.

The facts favorable to the conviction are that Franklin Stotts, Jr. lived with Michelle Gates in an apartment in Elkhart, Indiana. Also living in the apartment were the couple's two small children, ages one and two at the time, and Gates's five-year-old daughter from a previous relationship. Stotts supported himself by selling marijuana and cocaine. Approximately one week before April 20, 2005, Stotts had arrived home accompanied by three men – DeMarco Taylor, Andre Shepard, and Shorter. Gates had arrived home at the same time. Before they entered their apartment, Gates and Stotts observed that the door had been kicked in. The group entered the apartment and Stotts immediately went to his bedroom in the back of the apartment. He re-emerged a moment later carrying a large amount of money and said to the group, "Those stupid n*****s skipped right over \$10,000." *Transcript* at 311. Shorter, who had never been in Stotts's

¹ Ind. Code Ann. § 35-42-1-1 (West, PREMISE through 2007 1st Regular Sess.).

apartment before, was at that time staying in an apartment with Lonnie Birkhead just a few blocks away.

About a week later, on the evening of April 20, Gates, Stotts, and the three children were home. Stotts had quantities of marijuana packaged in gallon-sized Ziploc bags and smaller tie-off baggies stored in the kitchen and bedroom. At about 9:00 p.m., the couple's two-year-old daughter was asleep on the couch, Stotts was sitting on the couch watching television, and Gates was in the back bedroom putting the other two children to bed. Gates heard a loud noise that sounded like the apartment door being kicked in, followed by two voices screaming "Lay down, lay down". *Id.* at 317. Gates's parents, Diana and Mangle Causey, who lived in the apartment below Gates, also heard the boom and went up to Gates's apartment to investigate. They knocked on the door and someone armed with a pistol answered and ordered the Causeys inside. They refused to enter. The man who answered the door was a light-skinned African-American male, approximately 5 feet, 8 inches tall and weighing between 160 and 186 pounds, and with braided hair. The man wore dark clothing, had a hood over his head, and wore a black and white bandana. The Causeys saw Stotts run out of the apartment, and the aforementioned African-American male ran after him. Mangle heard gunfire, looked back at his daughter's apartment, and saw a second man. This man was taller and thinner than the first, wore a black ski mask and carried a long weapon.

Meanwhile, immediately after hearing the loud boom, Gates heard Stotts say, "Not in front of my kids. My kids are here." *Id.* The two-year-old who had been on the

couch ran into Gates's bedroom and everyone was screaming. Shortly thereafter, Gates heard "maybe two" bangs that sounded like gunshots. *Id.* at 318. According to Gates, the bangs "didn't sound like it was in our apartment, but it was in the building." *Id.* After quieting her children down, Gates walked toward the living room. She saw a "not very tall", muscular black male wearing a ski mask and a navy blue and gray nylon sweat suit and pointing a shotgun at her. *Id.* at 331. The man told Gates to lay down. Gates screamed "My kids" and the man left the apartment. *Id.*

After the man left, Gates briefly exited her apartment, but then re-entered and went to her children's bedroom. She looked out the window and saw a tall man wearing a bandana over his face holding a handgun standing over Stotts. She gathered her children and took them downstairs to her parents' apartment. She then went outside, where she found Stotts, laying on the ground bleeding, and complaining that he could not breathe. Gates went back inside and called 911. When police and emergency medical personnel arrived, Stotts was laying on the ground, bleeding, and complaining of shortness of breath. He was transported to the hospital, where he died a short time later.

Shorter had been staying in Birkhead's apartment for a few weeks at the time of the shooting. Birkhead observed that Shorter had a short, chrome, .380-caliber handgun and a shotgun. Shorter kept the shotgun on a shelf in his closet, along with a box of green and gold shotgun shells. At approximately 10:00 or 11:00 p.m. on April 20, Shorter and Jamar Lewis arrived at Birkhead's residence. Shorter, carrying his shotgun, wore a black nylon jacket with a white and gray "V" design; Lewis wore blue jeans and a

black and white bandana. Early the next morning, Birkhead saw Shorter with a large Ziploc bag of marijuana. Later that day, Birkhead saw Shorter hand the .380 handgun to Michael Dandridge. Dandridge later gave the gun to Derrick Glass, who later sold it to Marshal Love. Police ultimately recovered the handgun from Love's step-father, Terry Williams during a traffic stop. After subsequent ballistic tests, Indiana State Police Firearms Examiner Paul Fotia concluded that bullets recovered at the scene of Stotts's shooting and from Stotts's body were fired by the .380 handgun found in Williams's vehicle.

The State charged Shorter with murder and felony murder. A jury trial was conducted from April 23 - 26, 2006, after which Shorter was found guilty on both counts. Judgment of conviction was entered only as to the murder count. After a sentencing hearing, the court sentenced Shorter to sixty-three years, or eight years in excess of the presumptive.

1.

Shorter contends the trial court erred in admitting autopsy photos into evidence. Our Supreme Court has set out the standard of review for the admission of autopsy photos as follows:

Because the admission and exclusion of evidence falls within the sound discretion of the trial court, this Court reviews the admission of photographic evidence only for abuse of discretion. Relevant evidence, including photographs, may be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice. "Even gory and revolting photographs may be admissible as long as they are relevant to some material issue or show scenes that a witness could describe orally."

Amburgey v. State, 696 N.E.2d 44, 45 (Ind.1998). Photographs, even those gruesome in nature, are admissible if they act as interpretative aids for the jury and have strong probative value.

Corbett v. State, 764 N.E.2d 622, 627 (Ind. 2002) (quoting *Swingley v. State*, 739 N.E.2d 132, 133 (Ind. 2000) (some citations omitted)). The court has also noted that autopsy photos sometimes present unique problems because the pathologist has manipulated the corpse in some way during the autopsy. *Corbett v. State*, 764 N.E.2d 622. Generally, autopsy photographs are inadmissible if they show the body in an altered condition. *Id.* There are, however, situations where some alteration of the body is necessary to demonstrate the testimony being given. *Id.*

In this case, the State introduced ten autopsy photos into evidence. All but one depicted the bullet wounds to Stotts, unaltered by autopsy procedure. The photo of which Shorter complains depicts a wound suffered in Stott's buttocks. With respect to that wound, Stotts was shot in the lower right abdomen and the bullet traveled through his body and lodged, without exiting, in his right buttocks. The photo in question depicts an open, two- to three-inch incision at the site where the bullet lodged, with a surgeon's gloved hand holding the incision open, revealing the location where the bullet was found. As the court noted in ruling upon defense counsel's objection when the photo was offered at trial, the photo depicted with specificity the location from which evidence, i.e., a bullet, was recovered. Thus, the photograph had probative value. In assessing its prejudicial impact, the court stated that the photo depicted a "small incision" with "very little blood." *Transcript* at 396. We agree with that description. We conclude, therefore, that the

probative value of the photo outweighed its prejudicial impact and that the trial court did not abuse its discretion in admitting it into evidence.

Shorter next contends the trial court erred in admitting shotgun shells into evidence. A brief summary of the way in which the State obtained the shotgun shells would be useful. On May 5, 2005, Officer Bruce Anglemeyer of the Elkhart Police Department was called to the scene of a suspected burglary. The location to which he was dispatched happened to be the now-vacant apartment formerly occupied by Birkhead and Shorter. When Officer Anglemeyer looked in a bedroom closet, he discovered a half-full box of green and gold shotgun shells. The landlord intended to dispose of the shells, so Officer Anglemeyer took them, intending to give them to a fellow-officer who was a friend and who hunted. The aforementioned friend was injured at the time, however, and Officer Anglemeyer kept the box of shells in the front seat of his car. On August 1, 2005, Officer Anglemeyer's squad car was due for inspection. On that day, Anglemeyer threw the box of shells out of the window of his vehicle while driving along County Road 108. Several weeks later, Officer Anglemeyer learned that the shells might have evidentiary value in connection with a homicide case when a Sergeant Wargo approached him and asked if he had recovered some shotgun shells from Birkhead's former apartment. Officer Anglemeyer explained how he disposed of the shells, and was asked if he could retrieve them. He went back to that location and searched, but was unable to find the evidence. He was approached about the evidence again on February 1, 2006. It was decided that because the vegetation in the area would be seasonably thinner

than in August, he should try again to locate the shells he had thrown out of his car. This time, a search of the area in which he had discarded the shells uncovered five live green and gold shotgun shells lying near each other. Analysis revealed that the shells Officer Anglemeyer had discarded were identical to the ones discovered at the murder scene.

When the State sought to introduce photos of the shotgun shells into evidence, defense counsel objected on chain-of-custody grounds. Shorter asserts the same argument on appeal, contending:

The State offered no evidence to account for the whereabouts of the shotgun shells from early August of 2005 to mid February of 2006. This break, due to the shells being thrown out of a car window, breaks the links in the chain of custody. Because of this break, the shells should have never been admitted into evidence, because there was improper foundation for its admission. As admitted it was prejudicial evidence under Indiana Rules of Evidence 403. The admission of the shotgun shells gave the jury the false assumption that it had been proven that these are the items taken from Shorter's former apartment.

Appellant's Brief at 15.

“‘The chain-of-custody doctrine requires an adequate foundation to be laid showing the continuous whereabouts of physical evidence before it may be admitted into evidence.’” *Robinson v. State*, 724 N.E.2d 628, 640 (Ind. Ct. App. 2000) (quoting *Shipley v. State*, 620 N.E.2d 710, 715 (Ind. Ct. App. 1993)) (citations omitted), *trans. denied*. When the evidence is fungible, the State has the burden to give reasonable assurance that the property passed through the hands of the parties in an undisturbed condition. *Whaley v. State*, 843 N.E.2d 1 (Ind. Ct. App. 2006), *trans. denied*. The State need not exclude all possibility of tampering, however, and merely raising the possibility

of tampering is an insufficient method of challenging the chain of custody. *Id.* Further, the State does not have to establish a perfect chain of custody; any gaps go to the weight of the evidence and not to its admissibility. *Troxell v. State*, 778 N.E.2d 811 (Ind. 2002).

In the instant case, Officer Anglemeyer testified that he knew specifically where he had discarded the shells. That location was a remote location and the shells were thrown into an area of thick and high vegetation. When he returned to that spot to look for the shells approximately seven months later, he found five shells that appeared to be the same ones he had discarded months before. The shells were abandoned there for a period of months, and we agree with defense counsel that it is theoretically possible that the ones found were not the same ones Officer Anglemeyer threw out of his window in August. We conclude in this case, however, that the circumstances in question affect the weight of the evidence, not its admissibility. This is especially so where, as here, the jury was fully apprised of the sequence of events leading from initial discovery of the evidence to its introduction at trial. Defense counsel questioned Officer Anglemeyer closely on that subject, to the point that the officer conceded it was not impossible that “someone else could have discarded shotgun shells out the window in that area as well.”

Transcript at 707.

Moreover, even assuming for the sake of argument that the trial court erred in admitting the evidence, the error was harmless. Improperly admitted evidence is deemed harmless if the conviction is supported by substantial independent evidence of guilt sufficient to satisfy the reviewing court that there is no substantial likelihood the

challenged evidence contributed to the conviction. *Bailey v. State*, 806 N.E.2d 329 (Ind. Ct. App. 2004), *trans. denied*. The erroneous admission of evidence that is merely cumulative of other evidence in the record is not reversible error.

In this case, several witnesses identified Shorter as the assailant who broke into Gates's apartment armed with the shotgun. Most significantly, Birkhead testified not only that Shorter had a shotgun when he lived in Birkhead's apartment, but also that he had seen shotgun shells matching those found at the murder scene in the closet of Shorter's bedroom. Thus, even assuming for the sake of argument that the trial court erred in admitting the shells, the error was harmless.

2.

Shorter contends the evidence was not sufficient to support the conviction for murder. Specifically, he contends the State's evidence "lead[s] only to speculation of the identity of the perpetrators of this crime, and such speculation cannot form the basis for the reasonable inferences necessary to sustain a conviction beyond a reasonable doubt." *Appellant's Brief* at 8.

When considering a challenge to the sufficiency of evidence to support a conviction, we respect the fact-finder's exclusive province to weigh conflicting evidence and therefore neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the verdict, and "must affirm 'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" *Id.* at 126 (quoting *Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

Gleaves v. State, 859 N.E.2d 766, 769 (Ind. Ct. App. 2007).

Shorter first contends the State did not present sufficient evidence to prove he was one of the assailants at Gates's apartment. To the contrary, Gates testified that one of the intruders had the same build as Shorter. The clothing that Gates testified the intruder was wearing matched Birkhead's description of the clothes Shorter was wearing on the evening in question. Shorter was also connected to the shooting through evidence related to the weapons used by the assailants. Birkhead testified that Shorter possessed a chrome, .380 handgun. Several days after the shooting, Birkhead saw Shorter hand that gun to Dandridge, who later gave it to Glass, who sold it to Marshal Love. The gun was taken from Love following a traffic stop, and subsequent ballistic tests establish that said handgun was the one used to shoot and kill Stotts. Also, Birkhead testified that Shorter possessed a shotgun and that he was carrying the shotgun when he returned to the apartment on the night of the shooting. Birkhead also testified that he saw shotgun shells in Shorter's closet that matched those found at the scene of the shooting. Finally, Shorter confessed his involvement in the shooting to two people. The foregoing evidence was sufficient to prove that Shorter was involved in the shooting.

Shorter next claims there was insufficient evidence to convict him of murder on the basis of accomplice liability. Under the theory of accomplice liability, one who aids, abets, or assists in a crime is equally as culpable as the one who commits the actual crime. *See Johnson v. State*, 687 N.E.2d 345 (Ind. 1997). There is no distinction between the criminal responsibility of a principal and that of an accomplice. *McQueen v. State*, 711 N.E.2d 503 (Ind. 1999). The Indiana statute governing accomplice liability

establishes it not as a separate crime, but merely as a separate basis of liability for the crime charged. *See* Ind. Code Ann. § 35-41-2-4 (West, PREMISE through 2007 1st Regular Sess.); *Hampton v. State*, 719 N.E.2d 803 (Ind. 1999).

The evidence favorable to the conviction established that Shorter supplied not only the shotgun that he carried, but also the handgun that Lewis carried and used to inflict the fatal wounds upon Stotts. Moreover, not only did Shorter fail to oppose Lewis, but Shorter fired at least one shot from his shotgun during the commission of the crime. Also, shortly after Stotts's murder, Shorter was seen in possession of a bag of marijuana resembling one taken from Stotts's apartment during the incident. These facts are sufficient to support Shorter's murder conviction on the basis of accomplice liability.

We note that Shorter also challenges the sufficiency of the evidence supporting his conviction of felony murder. The trial court merged the conviction for felony murder into the conviction for murder and entered judgment of conviction only as to the murder charge. Therefore, we need not address this argument.

3.

Shorter contends the trial court erred in sentencing him in two respects. He claims first that the trial court cited improper aggravators in supporting a sentence that exceeds the presumptive sentence. Second, he claims the sentence is inappropriate in view of his character and the nature of the offense he committed.

Effective April 25, 2005, our legislature amended our sentencing statutes to replace presumptive sentences with advisory sentences. Because Shorter committed his

crime before the amendment's effective date, the presumptive sentencing scheme applies. *See Guteruth v. State*, 868 N.E.2d 427 (Ind. 2007). When evaluating sentencing challenges under the presumptive statutory scheme, it is well established that sentencing decisions lie within the trial court's discretion. *Williams v. State*, 861 N.E.2d 714 (Ind. Ct. App. 2007). Those decisions are given great deference on appeal and will be reversed only for an abuse of discretion. *Golden v. State*, 862 N.E.2d 1212 (Ind. Ct. App. 2007). The broad discretion of the trial court includes the discretion to determine whether to increase the presumptive sentence. *Jones v. State*, 807 N.E.2d 58 (Ind. Ct. App. 2004), *trans. denied*. When, as here, the trial court imposes an enhanced sentence, it must: (1) identify significant aggravating and mitigating circumstances, (2) state the specific reasons why each circumstance is aggravating or mitigating, and (3) evaluate and balance the mitigating circumstances against the aggravating circumstances to determine if the mitigating circumstances offset the aggravating circumstances. *Trowbridge v. State*, 717 N.E.2d 138 (Ind. 1999). One valid aggravator alone is enough to enhance a sentence. *Minter v. State*, 858 N.E.2d 696 (Ind. Ct. App. 2006).

Shorter contends the trial court erred in identifying the following aggravating factors, which were not found by the jury: (1) Shorter had another case pending involving a crime of violence, (2) Shorter's use of marijuana since the age of nine, (3) Shorter's motive for committing this offense was robbery, (4) Shorter had not been rehabilitated despite multiple contacts with the criminal justice system. Shorter contends the finding

of these aggravators violates his right under *Blakely v. Washington*, 542 U.S. 296 (2004) to, with but a few exceptions, have any fact that increases the penalty for a crime to be submitted to and determined by a jury.

We note first that Shorter admitted in open court that he had smoked marijuana since the age of nine. Such is an appropriate aggravator under *Blakely*. See *Mitchell v. State*, 844 N.E.2d 88 (Ind. 2006) (facts admitted by the defendant may properly be found as aggravators). Shorter also acknowledged that his presentence investigation report was accurate in stating that he was a defendant in a then-pending case involving a crime of violence. See *id.*; see also *Bacher v. State*, 722 N.E.2d 799, 804 (Ind. 2000) (“allegations of prior criminal activity need not be reduced to conviction in order to be considered a proper aggravating factor” (quoting *Beason v. State*, 690 N.E.2d 277, 281 (Ind. 1998))).

The court did not err in finding as aggravating that Shorter’s motive for committing the murder was robbery. Although Shorter is correct that the jury did not enter a separate finding to that effect, the jury found Shorter guilty of felony murder. The underlying crime alleged in the felony-murder charging information was robbery. Therefore, this finding was implicit in the jury’s guilty verdict on the felony murder charge. See *Morgan v. State*, 829 N.E.2d 12, 18 (Ind. 2005) (“aggravators whose language is not specifically found by a jury or admitted by the defendant, are not necessarily impermissible so long as the aggravator ... was 1) supported by facts

otherwise admitted or found by a jury and 2) meant as a concise description of what the underlying facts demonstrate”).

The fourth aggravator of which Shorter complains is his failure to rehabilitate despite repeated contacts with the criminal justice system. In *Morgan*, our Supreme Court indicated that “aggravator[s] such as ‘failed to rehabilitate’ or ‘failed to deter’” are not themselves aggravating facts, but “merely describe the moral or penal weight of actual facts.” *Id.* at 17. Thus, in this case, the failure to rehabilitate was not properly used as a separate aggravator

We turn now to the aggravating factors found by the jury that Shorter alleges were not supported by sufficient evidence. Those factors include: (1) the risk that Shorter will commit another crime; (2) the nature and circumstances of the crime; (3) Shorter’s character and condition; (4) Shorter engaged in subsequent criminal activity; and (5) Shorter is a dangerous person who poses a significant threat to the community.

Regarding the risk of committing crimes in the future, Shorter’s pattern of criminal activity despite his relative youth constitutes sufficient evidence to support the jury determination that he poses a risk to commit other crimes.

There was evidence that Shorter committed this crime in the presence of children. This is sufficient to support the jury’s determination that the nature and circumstances of the crime was an aggravating factor.

The jury found that Shorter’s character and condition were aggravating circumstances. This finding was supported by evidence showing that Shorter associated

with criminals and had previously been involved in criminal endeavors. Moreover, the aforementioned fact that he chose to commence the robbery and attack upon Stotts in the presence of Stotts's children reflects that his character was an aggravating factor.

The jury found as an aggravator that Shorter had since the commission of this offense engaged in subsequent criminal activity. The State concedes there was not sufficient evidence to support this finding.

The jury found as an aggravator that Shorter is a dangerous person who poses a threat to the community. Shorter contends, without citation to authority, that this is not a proper aggravator unless there is evidence to establish "why this specific individual is a threat[,] above and beyond that he was just convicted of murder." *Appellant's Brief* at 26. We conclude that the evidence of the manner in which this crime was committed, not merely the fact that he committed it in the first place, supports the jury's finding that he is a dangerous person. In order to obtain Stotts's drugs and/or money, Shorter armed himself and another person, went to Shorter's residence, broke in, and in the presence of children, commenced the attack that resulted in Stotts's murder. The manner in which the crime was committed supports the determination that Shorter is a dangerous person.

In summary, we conclude that all but two of the aggravators found by the jury and the trial court (i.e., the failure to rehabilitate and the commission of subsequent criminal activity) were proper and supported by the evidence.

When, as here, at least one aggravating circumstances found by the trial court is invalid, we must decide whether the remaining circumstance or circumstances are

sufficient to support the sentence imposed. *Cotto v. State*, 829 N.E.2d 520 (Ind. 2005). When we find an irregularity in a trial court's sentencing determination, we have at least three courses of action. We may: 1) "remand to the trial court for a clarification or new sentencing determination", 2) "affirm the sentence if the error is harmless", or 3) "reweigh the proper aggravating and mitigating circumstances independently at the appellate level." *Id.* at 525. In this case, we conclude that the erroneous aggravators are not significant in the context of the other aggravators properly cited; therefore, the errors are harmless.

Finally, we consider Shorter's contention that his sixty-three-year sentence is inappropriate. We have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B); *Corbin v. State*, 840 N.E.2d 424 (Ind. Ct. App. 2006). "We recognize, however, the special expertise of the trial courts in making sentencing decisions; thus, we exercise with great restraint our responsibility to review and revise sentences." *Scott v. State*, 840 N.E.2d 376, 381 (Ind. Ct. App. 2006), *trans. denied*.

By the age of nineteen, Shorter had repeated brushes with the law, and had by then been convicted of one misdemeanor as an adult and had three true findings entered against him as a juvenile. One of those true findings was for a crime that would have been class C felony robbery if he were an adult. With an associate, he went to the home of an acquaintance on April 20, 2005 to rob that person. He and his associate were armed

with weapons that he (Shorter) supplied. They broke into the victim's apartment notwithstanding that there were children present, and shots were fired as the incident unfolded. After the incident, Shorter was seen in possession of drugs stolen from the victim's apartment. In view of Shorter's character and the nature of the offense of which he was convicted, and considering the proper aggravating circumstances found by the jury and the trial court, we conclude that the enhanced sixty-three-year sentence imposed by the trial court is appropriate.

Judgment affirmed.

ROBB, J., and MATHIAS, J., concur.